JAN 19 2001

No. 99-1994

Supreme Court, U.S.
FILED
JAN 19 2001
CLERK

IN THE

Supreme Court of the United States

STATE OF NEVADA; WILLIAM MOLINI; RICH ELLINGTON; MICHAEL SPENCER; BILL FITZMORRIS,
Petitioners,

v.

FLOYD HICKS; TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES; JOSEPH VAN WALRAVEN, HON.,
Respondents.

On Writ of Certiori to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT FLOYD HICKS

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QUESTIONS PRESENTED

1. Whether a tribal court has jurisdiction over civil suits brought by a tribal member against state officials in their individual capacities, where the suits are for alleged illegal and tortious conduct by the officials against the tribal member on his trust allotment land within his reservation.

2. Whether immunity defenses that may be available to state officials, who have been sued in tribal court in their individual capacities, should be adjudicated by the tribal court prior to any federal court intervention.

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STATEMENT OF THE CASE

This case is remarkable for the novel assertion that brings it before the Court. The petitioners, the State of Nevada and individual state officials, would have this Court rule that the state officials are exempt from the jurisdiction of a court simply by virtue of their official status and race. What mandates such exemption, according to the petitioners, is that the court in question is a tribal court. For the petitioners, the novelty here is the fact that an Indian sued non-Indian state officials in the court of a tribal jurisdiction. Pets. Brief at 1-2. But what appears to the petitioners as unusual for an Indian to attempt in a tribal court would not be unusual for others to undertake in the courts of other jurisdictions. *See, e.g., Hafer v. Melo,* 502 U.S. 21 (1991) (suit brought against state officials in their individual capacities); *Ortega v. Reyna*, 953 P.2d 18 (Nev. 1998) (suit brought against state officials for violations of federal and state law); *Boisclair v. Superior Court*, 801 P.2d 305 (Cal. 1990) (suit brought against tribal officials for conspiracy to commit tortious acts).

Respondent Floyd Hicks, a Native American, sued Nevada game wardens after they searched his property and seized personal possessions on two separate occasions on his trust allotment land within the reservation of the Fallon Paiute-Shoshone Tribes (the "Fallon Tribes"). Pet. App. A3-A4, B2-B3, E1-G1. The Fallon Tribes constitute a federally-recognized Indian community, of which Mr. Hicks is an enrolled member. The Fallon reservation, located in the Lahontan Valley in Western Nevada, is carved out of the Great Basin Region, part of the aboriginal territories of the Shoshone and Paiute peoples, who have inhabited the region since long before the genesis of the United States and the State of Nevada. *See generally* Martha C. Knack & Omer C. Stewart, *As Long as the River Shall Run: An Ethnohistory of the Pyramid Lake Indian Reservation* 1-28 (1999). The

reservation was established by federal authority under the Act of April 30, 1908, 35 Stat. 85.

Mr. Hicks filed two separate suits against the Nevada game wardens in the Tribal Court in and for the Fallon Paiute-Shoshone Tribes, complaining of damages arising from the alleged unlawful search and seizures on his trust allotment. The game wardens had conducted the two searches after obtaining tribal court approval for the execution of the warrants.[1] On each occasion, the game wardens obtained the warrant based on the same information of an unnamed informant who alleged that at one time, nearly two years prior to the first search, he had seen "recently killed" sheep in Mr. Hicks' possession which were believed to be evidence of off-reservation poaching of protected animals. Pet. App. E1-E2, F3-F4. The Nevada game wardens eventually conceded that they had found no evidence of any violations of law by Mr. Hicks, but only after having twice entered his trust allotment and searched his property, and having twice confiscated forty-year-old mounted big horn sheep heads of a subspecies other than that protected by Nevada law. Pet. App. B2-B3. The mounted heads are alleged to have been of great personal and financial value to Mr. Hicks. *See* Amended Complaint, J.A. 13. One of the mounted heads was allegedly damaged after it was seized by the game wardens and before its eventual return to Mr. Hicks. Pet. App. A11.

A retired tribal police officer with many years of honorable service, Mr. Hicks would not have expected to be subject to searches by law enforcement officials that would involve

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[1] The state court had instructed that it:

> has no jurisdiction on the Fallon Paiute Shoshone Indian Reservation and before any search is conducted in furtherance hereof, an approval authorizing same must be obtained from the Fallon Tribal Court in and for the Fallon Paiute Shoshone Tribes.

Pet. App. G1.

unwanted intrusions in his home and the confiscation and mutilation of lawfully possessed and valuable property. In his complaints before the tribal court against the game wardens, Mr. Hicks alleged causes of action for tortious conduct in violation of tribal law and violations of federal civil rights remediable under 42 U.S.C. § 1983. He alleged malicious intent or bad faith on the part of the game wardens and claimed that they had acted beyond the scope of their lawful authority. Pet. App. I3. Mr. Hicks' claims raise numerous issues of fact, including the facial sufficiency of the affidavits relied upon for the warrants, the validity of the state search warrants, the legality of the tribal court orders authorizing execution of the warrants, the reasonableness of the game wardens in relying on those orders, the reasonableness of the searches, and the reasonableness of the seizure of Mr. Hicks' property. *Id.* at I3.

In addition to naming in his lawsuits the game wardens who conducted the search of his home on the Fallon reservation, Mr. Hicks named the State of Nevada and William Molini, Director of the Nevada Department of Wildlife.[2] He also named the tribal judge who purported to authorize the searches and the tribal police officers who accompanied the game wardens when they conducted the searches. Mr. Hicks later moved for and was granted a motion dismissing his claims against the State of Nevada and the state defendants in their official capacities. Pet. App. A5. The claims against the tribal judge and tribal police officers have also been either voluntarily dismissed by Mr. Hicks or otherwise resolved by the tribal court. *Id.* at B4. The only claims remaining in the tribal court are the claims against the state officials in their individual capacities—claims which

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[2] On or about January 18, 2001, Mr. Hicks filed motions in both cases before the tribal court (CV-FT-91-034 and CV-FT-92-031) to drop William Molini as a defendant. A hearing has yet to be scheduled.

have been stayed for over six years pending federal court disposition of the petitioners' assertions.

While it is undisputed that Mr. Hicks' claims in tribal court are against state officials in their individual capacities, and the State of Nevada is no longer named as a defendant in the proceedings, the petitioners have challenged the jurisdiction of the tribal court on grounds of sovereign as well as individual immunity under state law. The petitioners also now contend that the tribal court lacks jurisdiction because the game wardens who have been sued are non-Indians and not members of the Fallon Tribes.

In their special appearance before the tribal court, the petitioners asserted sovereign and individual immunity as partial grounds for a motion to quash service of process. Pet. App. J1-J7. The tribal court twice quashed service, but on grounds other than immunity. *Id.* at L1. The Inter-Tribal Court of Appeals of Nevada reversed the tribal court's second order quashing service and remanded the case back to the tribal court for trial. *Id.* at C5. The petitioners then immediately sought federal court declaratory and injunctive relief against the exercise of tribal court jurisdiction.

In affirming the lower federal court, the Ninth Circuit Court of Appeals held that the tribal court does have jurisdiction over Mr. Hicks' causes of action and that the petitioners have not exhausted tribal court remedies with respect to their claims of immunity. Pet. App. A3.

SUMMARY OF ARGUMENT

The decision of the Ninth Circuit Court of Appeals should be affirmed.

1. The court of appeals correctly held that the Fallon tribal court has jurisdiction over the civil suits brought by Mr. Hicks against Nevada game wardens. Neither the game wardens' status as non-Indians and non-tribal members, nor their status as state officials, deprives the tribal court of jurisdiction.

a. The Fallon tribal court has jurisdiction to adjudicate Mr. Hicks' suits against individuals who are not members of the tribe. These suits arise out of the game wardens' alleged wrongful execution of searches and seizures, which occurred at Mr. Hicks' home on trust allotment land within the Fallon reservation. Pet. App. A3. Under tribal and federal law, the tribal court has jurisdiction over such non-member conduct on Indian land, including trust allotment land, within the reservation. *See Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997). Even if Indian land status were not conclusive of tribal jurisdiction under federal law, the game wardens are subject to the jurisdiction of the tribal court in this case, because their conduct involves "consensual relationships with the tribe" and affects its "political integrity, . . . health [and] welfare." *Id.* at 446 (quoting *Montana v. United States*, 450 U.S. 544, 565-566 (1981)). The game wardens asked the tribal court for its permission and consent to enforce their state warrants, thereby purposefully availing themselves of the privilege of conducting activities within the exterior boundaries of the reservation. Further, their alleged violations of the rights of a tribal member, by acts purporting to rely on the authority of the tribe itself, threaten the tribe's political integrity and welfare.

b. Nor does the official status of the game wardens sued by Mr. Hicks pose a bar to the jurisdiction of the tribal court. The petitioners argue that state sovereign immunity divests the Fallon tribal court of "any jurisdiction over state officials," even if they are sued in their individual capacities. Pets. Brief at 7. This argument attempts to forge an exceptional jurisdictional bar to individual capacity suits against government officials, a bar that would apply exclusively to tribal courts. State officials do not have such blanket immunity from suit in state or federal court. Nor do tribal officials enjoy any similar jurisdictional immunity from suit in state court as a result of tribal sovereignty. *See* cases cited, *infra*, note 9.

This Court has firmly established that suits against government officials in their individual capacities to recover money damages, such as the suits pled by Mr. Hicks, are not suits against the sovereign and hence sovereign immunity poses no bar to jurisdiction over them. *See Hafer v. Melo*, 502 U.S. 21 (1991); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 686-88 (1949). Individually sued officials may raise immunity defenses, but such defenses are contingent upon an adjudication of facts beyond merely establishing official status. No such adjudication has occurred in regard to the assertions of immunity against Mr. Hicks' lawsuits.

Federal law does not support the petitioners' argument for a special jurisdictional rule of blanket immunity for state officials that would be exclusive to tribal courts. The petitioners' reliance on the Eleventh Amendment and constitutional structure is misplaced. As this Court acknowledged in *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991), Indian tribes were not parties to the constitutional convention. Hence, they are not subject to constitutional limitations on their authority, see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), including any limitations of the Eleventh Amendment or constitutional structure that relate to state sovereign immunity. *Accord*, Brief *Amicus Curiae* of the States of Montana, et al. in Support of Petitioners ("States Amicus Brief") at 6. In the absence of any governing federal law, any immunity to be accorded state officials by a tribal court is a matter of comity and tribal law. *See generally Nevada v. Hall*, 440 U.S. 410 (1979), *reh'g denied*, 441 U.S. 917 (1979) (states not bound to accord sovereign immunity to one another).

c. The petitioners' effort to impose an exceptional rule of official immunity on tribal courts, and to hold tribes more generally divested of authority over non-members, is not aided by reliance on the colonial era doctrine of discovery or by related attempts to characterize tribes as inherently

inferior sovereigns. *See* States Amicus Brief at 22-26; Pets. Brief at 16-20. Such arguments are flawed in their assumptions about the historical facts, and they rest on attitudes that are at odds with American first principles of political ordering and with modern conceptions of racial equality. However much legal doctrine may have been constructed upon such flawed assumptions and attitudes in the past, it should not develop any further in that way. The "state of things," *Johnson & Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 590 (1823), today must be one in which contemporary reality is reconciled with an understanding of tribes as—like states—having retained "the dignity, though not full authority, of sovereignty," *Alden v. Maine*, 527 U.S. 706, 715 (1999) (5-4 decision) (Souter J., dissenting).

d. The contemporary reality for the present case includes considerations of the negative impact on needed state-tribal cooperation that would potentially follow a decision of this Court providing state law enforcement officials with blanket immunity from tribal authority. Only recently have tribes and states been able to find sufficient common ground and respect for each other's sovereignty in order to establish cooperative arrangements for law enforcement and other mutual governance concerns. A decision rendering state officials completely immune from suit in tribal court, while leaving tribal officials exposed to suit in state courts, will significantly undermine this complex, burgeoning and vitally necessary framework of state-tribal intergovernmental cooperation, by creating disincentives for tribal government officials who are asked to permit state officials onto tribal lands to enforce state laws.

2. While not enjoying a blanket jurisdictional immunity from suit in tribal court, the individual petitioners may assert immunity defenses on the basis of facts and determinations of law that have not yet been adjudicated. The court of appeals was correct to hold that such immunity defenses

should be adjudicated by the tribal court prior to any federal court intervention. The existence and scope of any immunity in tribal court is subject to the application of tribal law, for which a tribal court should be accorded great deference. The fact that federal law may be implicated in the adjudication of the petitioners' immunity defenses does not justify federal court intervention prior to the exhaustion of tribal court remedies. The requirement of exhaustion of tribal remedies, which applies in regard to determinations of tribal court jurisdiction, see *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 15-16 (1987), should also apply in regard to the petitioners' immunity defenses.

ARGUMENT

I. THE FALLON TRIBAL COURT HAS JURISDICTION OVER THE SUITS FILED BY MR. HICKS AGAINST STATE OFFICIALS IN THEIR INDIVIDUAL CAPACITIES FOR THEIR ALLEGED WRONGFUL ACTS ON TRUST LAND WITHIN THE RESERVATION.

Respondent Floyd Hicks is seeking relief from alleged illegal and tortious acts against him, through lawsuits before the court of the local sovereign under which he lives, the Fallon tribal court. Far from being a federal creation of the early twentieth century, see Pets. Brief at 26, the Fallon tribal court has deep historical roots in the pre-Columbian exercise of sovereignty by the country's first peoples. It is an integral part of the modern day manifestation of centuries-old authority structures that have governed the Paiute and Shoshone peoples since long before the State of Nevada was even contemplated. *See* National Tribal Judges Association, *Justice and the American Indian: The Indian Judiciary and the Concept of Separation of Powers* 18-19 n.6 (1974); William T. Hagan, *Indian Police and Judges: Experiments in Acculturation and Control*, 11-14 (1966).

The Fallon tribal court is among the country's numerous tribal justice systems that Congress has recognized as "an essential part of tribal governments," Indian Tribal Justice Act, 25 U.S.C. § 3601(5) (1994). Tribal courts are "important forums for ensuring public health and safety" and "for the adjudication of disputes affecting personal and property rights." *Id.* at § 3601(4)-(6). The State of Nevada itself statutorily recognizes the authority of tribal courts within the state, see Nev. Rev. Stat. § 233A.120, and provides that the state's "jurisdiction over civil causes of action . . . to which Indians are parties which arise in areas of Indian country in Nevada" shall exist only with the consent of the tribe concerned. Nev. Rev. Stat. § 41.430. The Fallon Tribes have given no such consent.

The petitioners, however, challenge the jurisdiction of the Fallon tribal court in this case on the basis of two factors, both of which relate to the status of the individual game wardens who were sued by Mr. Hicks: 1) their status as non-Indians and non-members of the Fallon Tribes, even though their alleged wrongful acts occurred on trust allotment land within the Fallon reservation; and 2) their status as officials of the State of Nevada, even though they are sued in their individual capacities. According to the petitioners, each of these characteristics, independent of the other, deprives the tribal court of jurisdiction as a matter of federal law.

The petitioners' jurisdictional challenge to the Fallon tribal court finds no basis in any federal statute, treaty, constitutional provision, or decision of this Court. For reasons described below, the Court should not oblige the petitioners' invitation to carve new, exceptional limitations on the exercise of tribal court jurisdiction. Such new limitations would be neither jurisprudentially sound nor conducive to much needed state-tribal cooperation.

A. The Lack of Tribal Membership of the Parties Sued by Mr. Hicks Does Not Deprive the Tribal Court of Jurisdiction as a Matter of Federal Law.

The court of appeals correctly held that the Fallon tribal court has jurisdiction over Mr. Hicks' suits against the individual petitioners, Nevada game wardens, although they are not Indians and not members of the Fallon Tribes. It is undisputed that the conduct giving rise to Mr. Hicks' claims—the search of his premises and the seizure of his property—took place on his trust allotment land within the Fallon reservation. The Fallon tribal court's jurisdiction was thus properly invoked with respect to "nonmember conduct on Indian land" over which "tribes retain considerable control." *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997).

This Court has guarded the authority of Indian governments over their reservations, particularly where tribal land and tribal members are involved. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (recognizing that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty"). The Court has also fashioned some boundaries for the exercise of tribal jurisdiction. In *Montana v. United States*, 450 U.S. 544 (1981), the Court decided that the character of tribes is such that they lack civil jurisdiction over non-members on *non-Indian* land, but it also carved out two important exceptions to that rule. The Court held that tribes retain inherent sovereignty over non-member conduct even on non-tribally owned or controlled lands where their exercise of civil jurisdiction is based on a consensual relationship between the non-Indian and the tribe or its members. *Id.* at 565. The second exception is that an Indian tribe may "retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct

effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

This Court's opinion in *Strate*, 520 U.S. 438, added clarity to the issue of tribal court jurisdiction and the application of the *Montana* rule in Indian country. The unanimous opinion of the Court in *Strate* recognized that the Court's precedent in the area of tribal civil jurisdiction in Indian country had been "variously interpreted." *Id.* at 453. However, the Court clarified that in *Montana* it was specifying a rule limiting jurisdiction only where "the Tribes cannot assert a landowner's right to occupy and exclude." *Id.* at 456. The Court observed that "in *Montana*, as in later cases following *Montana*'s instruction . . . the challenged tribal authority related to non-member activity on alienated, non-Indian reservation land. We 'can readily agree' in accord with *Montana* . . . that tribes retain considerable control over nonmember conduct on tribal land." *Id.* at 454 (citations omitted).

Under both *Strate* and *Montana*, tribal civil jurisdiction extends over non-Indian activities on land belonging to the tribe or land held in trust by the federal government for the tribe or its members. In *Strate*, this rule did not apply to allow tribal jurisdiction over a tort action arising out of an automobile accident on a public highway within a reservation, but only because the land in question was subject to a federal grant of right-of-way that precluded the tribe's exercise of proprietary rights and rendered the highway equivalent to non-Indian fee land. *Id.* at 454-56.

Here, the land in question is indisputably land to which Indian proprietary rights and strong tribal interests attach. Mr. Hicks' home, where the Nevada game wardens' alleged wrongful conduct took place, is within the borders of the Fallon reservation, on an allotment held in trust for him by the federal government. Pet. App. A3, B2, F1, I2. *See generally Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993) (finding that trust allotments are

"Indian Country" and the equivalent of tribal land for jurisdictional purposes). Additionally, the Fallon Tribes retained sovereignty over Mr. Hicks' trust allotment. It had not ceded to the state even a temporary or furtive right to control access to this land. The state wardens were accompanied by a tribal officer upon execution of each warrant (Pet. App. H7, I1), clearly showing that tribal law enforcement authority was not ceded by the granting of a specifically restricted warrant to Nevada officials.

The Fallon Tribes have exclusive criminal jurisdiction over minor crimes committed by tribal members within the borders of the reservation. *See Ex parte Crow Dog*, 109 U.S. 556 (1883). Before conducting any search or seizure on the reservation to investigate state crimes committed by tribal members, state officials must obtain a tribal search warrant from a tribal judge. *See* Fallon Tribe Law & Order Code, Title 1 § 4-40-010, 4-40-030(a). *See also United States v. Anderson*, 857 F. Supp. 52 (D.S.D. 1994) (finding that a state officer could not search the reservation residence of an Indian without tribal warrant). The game wardens did so in this case. They asked for and obtained tribal court consent for their search on the reservation. Pet. App. F1, G1.

As the Ninth Circuit found, "The tribal court merely granted a state official's request to come onto the reservation for a limited, clearly delineated purpose under circumstances where all inherent jurisdictional authority lay with the Tribe." The tribal court had granted authorization to search "'exterior premises only and to vehicles thereon,' demonstrating that the Tribe retained authority to direct the state officers' activities on tribal land." *Nevada v. Hicks*, 196 F.3d 1020, 1028 (1999). The Fallon tribal court did not abdicate its ability to control the warrants it issued; there was no divestiture of authority to the State of Nevada. Given these circumstances, and the Indian land status of the location at which the Nevada game wardens' challenged conduct took place, the Ninth Circuit was correct in holding

that the *Montana* presumption against tribal jurisdiction over non-Indians on non-Indian land does not apply in this case.

But even if the *Montana* presumption against tribal jurisdiction were to apply, both of the *Montana* exceptions to the presumption would be met. As for the consent prong of the *Montana* exceptions, the state game wardens asked the tribal court for its permission and consent to enforce their state warrants. The federal district court in this case specifically found that "by executing the search warrant on the premises of Hicks' allotment, the individual game warden defendants purposefully availed themselves of the privilege of conducting activities within the exterior boundaries of the reservation on tribal land." *Nevada v. Hicks*, 944 F. Supp. 1455, 1461 (D. Nev. 1996) (citing *Hanson v. Denckla*, 357 U.S. 235 (1958)); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982). "Nonmembers who lawfully enter tribal lands remain subject to the tribe's power . . . to place conditions on entry, on continuous presence, or on reservation conduct." *Merrion*, 455 U.S. at 144-45.

As to the second *Montana* exception, the alleged violations of the rights of a tribal member, by acts purporting to rely on the authority of the tribe itself, threaten the tribe's political integrity and welfare. To maintain its political integrity, effectiveness and ability to provide a judicial forum for those—such as Mr. Hicks—who live under tribal law and jurisdiction and rely upon the court and its justice, the Fallon tribal court must be able to supervise the warrants it issues. One of the vital mechanisms for such supervision must include the authority to adjudicate civil actions brought by victims of alleged civil rights violations and torts committed by those officials who go beyond the limits imposed by a tribal court warrant. Respect for the limits set by a tribal court should be the same accorded to the limits on warrants issued by state or federal courts. To say that tribal courts do not have jurisdiction over claims against individuals

purporting to act on the authority of the tribal courts would be to truncate tribal power to enforce tribal laws on tribal land and throughout the reservation. Applying such a rule in this case would mean that the tribal court, in approving warrants to state officials, has no power to require that searches under those warrants be conducted according to the tribal court's restrictions and limitations.

The words of this Court in *Williams v. Lee* are apt here:

> It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

358 U.S. 217, 223 (1959). Under the circumstances of this case and the rulings of this Court, the non-tribal member status of the game wardens sued by Mr. Hicks does not render the Fallon tribal court without jurisdiction.

B. The Petitioners' Claim of State Sovereign Immunity Does Not Bar Tribal Court Jurisdiction Over Mr. Hicks' Suits Against State Officials in Their Individual Capacities.

Apart from their status as non-tribal members, the game wardens' status as Nevada officials is said to pose a bar to the jurisdiction of the Fallon tribal court. The petitioners argue that this bar arises from the sovereign immunity of the state and the derivative immunities of its officers. Pets. Brief at 9-29. The petitioners effectively argue for an extraordinary rule of blanket immunity for state officials from suit in tribal court, such that tribal courts should be considered lacking in jurisdiction in all cases—no matter what the circumstances—in which state officials are named

as defendants for acts related to their official functions.[3] Such a far-reaching rule of blanket immunity for government officials is unknown in the American legal system, and if accepted by this Court would apply only to tribal courts—and not state and federal courts—unless the Court were to compound rejection of decades of its own jurisprudence.

1. Suits to Recover Money Damages from State Officials Personally, Such as the Suits Brought by Mr. Hicks, are Not Jurisdictionally Barred by State Sovereign Immunity.

It has long been established that a suit for money damages against state officers in their individual capacities—such as the suits by Mr. Hicks in this case—may be brought in an appropriate forum for wrongful conduct fairly attributable to the officers. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949) ("the principle that an agent is liable for his own torts 'is an ancient one and applies even to certain acts of public officers or public instrumentalities,'" quoting *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 580 (1943)); *Scheuer v. Rhodes*, 416 U.S. 232, 237-38 (1974); *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459, 462 (1945). The jurisdictional impediments arising from state sovereignty that may exist in regard to suits against states or against agents in their *official* capacities, simply are not present when state agents are sued—as here—in their *individual* capacities.

"[T]he distinction between official-capacity suits and personal capacity suits is more than 'a mere pleading

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[3] This characterization of the petitioners' position is in accord with that of the States Amicus Brief. "Petitioners invoke an absolute immunity against the attempted exercise of any form of tribal authority . . . a broader rule with respect to the individual Petitioners' immunity than may exist where federal or state tort law claims are involved." States Amicus Brief at 6, 8.

device.'" *Hafer v. Melo*, 502 U.S. 21, 26 (1991) (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (citation omitted)). Personal capacity suits are those that seek relief against officials personally, rather than relief that "'would expend itself on the public treasury or domain, or interfere with the public administration,' or . . . 'restrain the Government from acting, or . . . compel it to act.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101, n.11 (1984) (quoting *Dugan v. Rank*, 372 U.S. 609 (1963)). *See also Larson*, 337 U.S. at 688 (a suit is not against the state where the judgment sought "will not require action by the sovereign or disturb the sovereign's property"). Claims against officers to recover damages from them personally, such as those pled by Mr. Hicks in the present case under tribal and federal law, are not suits against the state. *See id.* at 687; *Hafer*, 502 U.S. at 25-29; Erwin Chemerinsky, *Federal Jurisdiction* 421 (3d ed. 1999).[4] Further, an individual capacity suit is not converted into one against the state where the state voluntarily, or as a matter of policy or state law, defends or indemnifies the state official sued. *See Blaylock v. Schwinden*, 862 F.2d 1352, 1354 (9th Cir. 1988); *Wilson v. Beebe*, 770 F.2d 578 (6th Cir. 1985), *distinguished on other grounds*, *MacFarland v. Oakland*

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[4] The petitioners (Pets. Brief at 20-21) confuse individual capacity damage suits, which are deemed not against the state, with the limited exception of *Ex parte Young*, 209 U.S. 123 (1908), which permits suits against officers in their *official capacities* where constitutional violations are alleged and the relief sought against the state is limited to prospective injunctive relief. *Cf. Edelman v. Jordan*, 415 U.S. 651 (1974) (declining to extend the *Ex parte Young* exception to allow retrospective injunctive and monetary relief in suit against state official sued in his official capacity); *Pennhurst*, 465 U.S. 89 (1984) (declining to extend exception to allow relief that would operate against state agency under pendent state claims in federal court). The *Ex parte Young* exception to the Eleventh Amendment bar for official capacity suits is irrelevant and not being invoked here.

County, 869 F.2d 1491 (6th Cir. 1989) (en banc); *Duckworth v. Franzen*, 780 F.2d 645, 650 (7th Cir. 1985); *Darul-Islam v. Dubois*, 997 F. Supp. 176 (D. Mass. 1998).

In the context of actions under 42 U.S.C. § 1983, this Court has unambiguously rejected the proposition that the official status or function of an individually-named defendant implicates a jurisdictional bar of state sovereign immunity. *See Hafer*, 502 U.S. at 26 (distinguishing individual capacity suits from suits against officers "acting in their official capacities," a phrase "best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury").[5] Likewise, this Court previously rejected the argument, also advanced now by the petitioners, that state officials should be immune from any suit related to their official functions because the officials' performance of their public duties may be hampered by damage claims. *Id.* at 31 (such concerns are properly addressed within the framework of personal immunity defenses) (citing *Forrester v. White*, 484 U.S. 219 (1988)).

By an argument flawed in its premise, the petitioners attempt to avoid the straightforward jurisprudence of this Court that upholds personal capacity lawsuits against state officials. The petitioners misconstrue § 1983 as a congressional abrogation of state sovereign immunity and, upon that premise, construct an elaborate argument that such abrogation does not, and could not, extend to tribal courts. On this ground, the petitioners advocate dismissal of Mr. Hicks' § 1983 claims. Pets. Brief at 24-29. Likewise, the petitioners argue that Mr. Hicks' individual capacity suits

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[5] In actions under § 1983, a claim that the activities were allegedly performed by way of "official acts" actually establishes the element necessary for bringing a § 1983 claim. *Hafer*, 502 U.S. at 27. (The requirement of "action under color of state law" means that the state officials may be liable "precisely because of [their] authority . . . .").

based on tribal law claims are not permitted since there has been no valid abrogation of state sovereign immunity in that regard either. Pets. Brief at 22-23.

Because the premise of the argument is wrong, the argument fails from its outset. Apparently, the petitioners are attempting to disturb the settled interpretations of § 1983, which establish that the statute affects no abrogation of state sovereign immunity, and that it does not rely on any such abrogation in providing a cause of action against state officials individually. *See Hafer*, 502 U.S. at 30; *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989) (enactment of § 1983 not intended to abrogate Eleventh Amendment immunity and authorize suits against states); *Quern v. Jordan*, 440 U.S. 332, 345 (1979). Thus, no "clear statement" on the part of Congress is required to show it intended to abrogate state sovereign immunity to allow § 1983 actions specifically in tribal court, since no such abrogation is implicated by such actions.[6]

Instead, the ordinary presumptions apply: Individual capacity suits under § 1983 are not suits against the state, and tribal courts, as courts of general jurisdiction, can apply federal law and entertain causes of action under § 1983 as part of their inherent authority. *See El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 486 n.7 (1999) ("Tribal courts can, and do decide questions of federal law . . .") (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) (tribal courts available to vindicate federal rights)). *See also Landmark Golf, Ltd. v. Las Vegas Paiute Tribe*, 49 F. Supp. 2d 1169, 1174 (D. Nev. 1999) ("A claim that a federal statute deprives a tribal court of jurisdiction will fail

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[6] Having posited erroneously that individual capacity suits under § 1983 are based on a congressional abrogation of state sovereign immunity, the petitioners search in vain for a "clear statement" from Congress that it intended the abrogation to extend to tribal courts and for tribal courts to entertain § 1983 claims. Pets. Brief at 24-27.

unless it can be shown that the statute contains an express jurisdictional prohibition.") (citing *Middlemist v. Secretary of Interior*, 824 F. Supp. 940 (D. Mont. 1993), *aff'd without opinion*, 19 F.3d 1318 (9th Cir. 1994), *cert. denied*, 513 U.S. 961 (1994)).

As with his claims under § 1983 against the individual petitioners, Mr. Hicks' claims under tribal law are limited to seeking relief against these officials in their individual capacities. And just as his § 1983 claims, his tribal law claims do not depend on an abrogation of sovereign immunity, so none need be established here.

Sovereign immunity is no more forbidding, as a matter of federal law, in respect to Mr. Hicks' tribal law claims than it is in relation to his § 1983 claims. The principle that government officials may be sued individually has been upheld consistently for actions other than § 1983 claims,[7] including claims based on state law.[8] Significantly, state courts have adjudicated state law claims against individually named tribal officials, notwithstanding the federal law-protected sovereign immunity of tribes, within the same

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[7] *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (White House officials had qualified immunity defense, but not an absolute or jurisdictional immunity, in non-§ 1983 "damages suit based on their official acts"); *Larson*, 337 U.S. at 686 ("no jurisdictional difficulty" where suit is to recover damages against agents personally, "whether sounding in tort or contract"); *Ford Motor*, 323 U.S. at 462 ("Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally.").

[8] *Wilson v. UT Health Ctr.*, 973 F.2d 1263, 1271 (5th Cir. 1992) ("*Pennhurst* and the Eleventh Amendment do not deprive federal courts of jurisdiction over state law claims against state officials strictly in their individual capacities"); *accord, Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 102 (2d Cir. 1998); *Peña v. Gardner*, 976 F.2d 469, 473 (9th Cir. 1992) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 111 n.21 (1984)).

logic and subject to the same defenses under which personal capacity suits have proceeded in federal court.[9]

To be sure officials sued individually under § 1983, or pursuant to other causes of action, may affirmatively raise and attempt to prove immunity defenses on the basis of assertions of good faith or other considerations that go beyond or challenge the allegations of the complaint. *See Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) (§ 1983 to be read "in harmony with general principles of tort immunities and defenses"); *Wood v. Strickland*, 421 U.S. 921, 999-1000 (1975) (describing common law qualified good faith immunity for tort actions as applicable to § 1983 actions). *Cf. Turner v. Martire*, 82 Cal. App. 4th 1042 (Cal. Ct. App. 2000) (tribal law enforcement officers subject to suit unless they could demonstrate common law immunity upon

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[9] *See, e.g., White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654, 658 (Ariz. 1971) (tribal officials "not immune from being sued individually [in breach of contract case] for any actions in excess of their duties"); *Burnham v. Pequot Pharm. Network*, No. CV95536264, 1998 WL 345463 (Conn. Super. Ct. June 19, 1998) (motion to dismiss employment claims against individual tribal officials on grounds of tribal immunity denied); *Drumm v. Brown*, No. CV960079971, 2000 WL 73277 (Conn. Super. Ct. Jan. 10, 2000) (tribal immunity held not to shield tribal officials from suit based on their alleged "[i]ntentional, tortious misconduct"); *Boisclair v. Imperial Granite Co.*, 51 Cal. 3d 1140, 1158 (Cal. 1990) (tribal official may be held liable when conduct is in excess of authority); *Hegner v. Dietze*, 524 N.W.2d 731 (Minn. Ct. App. 1994) (factual issues remained about whether immunity should be provided to tribal official); *Gayle v. Little Six, Inc.*, No. C5-99-430, 2000 WL 16320 (Minn. Ct. App. Jan. 11, 2000) (scrutinizing claims of sovereign and qualified immunity). *See also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) (while sovereign immunity of tribe bars suit against it, "[w]e have never held that individual agents or officers of a tribe are not liable in actions"); *Santa Clara Pueblo*, 436 U.S. at 59 (tribal officials may be sued for violation of civil rights although tribes themselves are immune); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343 (2d Cir. 2000) (copyright claims dismissed against tribe but not against individual defendants).

showing that conduct was discretionary and within scope of official duties). And, as discussed in Part II, *infra*, the tribal forum is available to the petitioners to assert such defenses against the lawsuits filed by Mr. Hicks. But the potential availability of immunity defenses in personal capacity suits does not, without more, deprive a court of jurisdiction. *See Larson*, 337 U.S. at 687 n.7 (contrasting individual immunity defenses in tort or contract actions with "limitations on the court's jurisdiction to hear a suit directed against the sovereign"). *Cf. White Mountain Apache*, 480 P.2d at 658 (jurisdiction upheld for individual claims against tribal officials and case remanded to determine whether alleged acts were within scope of official duties in respect to immunity defense). It would require a substantial leap beyond existing precedent to find the jurisdictional bar advocated by the petitioners, a bar that would provide what amounts to a blanket immunity for state game wardens such as those sued by Mr. Hicks.

2. *Federal Law Does Not Impose on Tribal Courts a Special Jurisdictional Rule of Blanket Immunity for State Officials.*

In the face of consistent precedent declining to regard state sovereign immunity as a jurisdictional bar to suits against state officials in their individual capacities, the petitioners argue for a novel jurisdictional rule of blanket official immunity that would be unique to tribal courts. State sovereign immunity is claimed by the petitioners to be a force that limits the authority of Indian tribes and their courts to an extent it does not (and cannot) for other sovereigns. But the petitioners can point to no federal statute or treaty that imposes on tribal courts the extraordinary state official immunity that they advocate, because none exists.

In the absence of any such federal statute or treaty, the petitioners' argument rests on constitutional norms interpreted in light of factors that are particular to tribes. But

rather than support the petitioners' position, the particular status of tribes in relation to the Constitution points in the other direction. Not only does the Constitution fail to provide state officials with a blanket immunity from suit in tribal court, it is at best tenuous in the extent to which it extends to tribal jurisdictions any immunities at all deriving from state sovereignty

a. The Constitution does not extend state sovereign immunity to bar tribal court jurisdiction over state officials sued in their individual capacities.

The petitioners base their argument on the Eleventh Amendment and an account of constitutional structure, relying on decisions of this Court that have found constitutional protection for state sovereign immunity against the federal government. Pets. Brief at 10-32 (citing, *inter alia, Alden v. Maine*, 527 U.S. 706 (1999); *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)). The petitioners' novel constitutional theory is off the mark, because the constitutional protections and corresponding limitations invoked by the petitioners, and developed by the Court in the cases cited, have no application here.

"As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).[10] It follows that

[10] The fact that Indian tribes were parties to some of the Court's recent sovereign immunity cases is irrelevant for the purposes of the present case, despite what the petitioners would lead this Court to believe. As

constitutional limitations that extend from state sovereign immunity do not apply to tribes or their courts. *See Montana v. Gilham*, 133 F.3d 1133, 1136 (9th Cir. 1998), ("the Eleventh Amendment offers no constitutional limit on the jurisdiction of tribal courts just as it does not limit the jurisdiction of sovereign states").[11]

First principles of American constitutionalism, including the framers' canons of popular sovereignty,[12] dictate that the constraints arising from the Constitution not apply to the tribes, which were excluded from the process by which the Constitution was adopted. This Court has understood the constitutional norms of state sovereign immunity, as well as the limitations those norms impose on the authority of the federal government, as a product of a consensual compact among the states. *See, e.g., Alden*, 527 U.S. at 725-727 (5-4

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discussed below, the outcomes of *Alden, Seminole, Blatchford,* and *Coeur d'Alene* were not predicated on the tribal status of the parties attempting to invoke federal jurisdiction, but rather on an assessment of the constitutional limitations on the invoked federal jurisdiction.

[11] The Ninth Circuit in *Gilham*, however, ultimately determined that tribal courts do not have jurisdiction to entertain suits against states, upon the reasoning that such authority is not consistent with their character and dependent status. For reasons discussed below, this alternative theory for finding tribal authority diminished by state sovereignty is flawed. *See, infra*, pp. 31-42. In any event, while finding tribal courts jurisdictionally barred to adjudicate suits against states, the Ninth Circuit in that case did not foreclose its holding in the present case affirming tribal court jurisdiction for individual capacity suits against individually named state officials.

[12] As James Madison stated:

> [T]he ultimate authority, wherever the derivative may be found, resides in the people alone; and that it will not depend merely on the comparative ambition or address of the different governments, whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expence of the other. Truth no less than decency requires, that the event in every case, should be supposed to depend on the sentiments and sanction of their common constituents.

THE FEDERALIST No. 46 (James Madison).

decision) (Souter, J., dissenting) (describing consensual state concerns behind the creation of the Eleventh Amendment); *Nevada v. Hall*, 440 U.S. 410, 418-19 (1979) (during debate and ratification of Eleventh Amendment, states "vitally interested" in scope of delegated federal judicial power). In *Blatchford*, the Court highlighted that the Constitution did not alter attributes of tribal and state sovereignty in relation to each other, since tribes were not parties to the constitutional compact. 501 U.S. at 782 ("absurd" to suggest that tribes surrendered their own immunity "in a convention to which they were not even parties"). Thus, in concluding that federal courts are without jurisdiction to hear suits by tribes against states, the Court in *Blatchford* found tribes to be, in relevant respects, analogous to foreign states which stand outside the constitutional structure. *Id.* The Court reasoned that tribes, like foreign states, were not parties to the constitutional "mutuality of concession" by which states agreed to subject each other to suit in federal court upon delegating authority to the federal judiciary. *Id. Cf. Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934). Similarly, the tribes, like foreign states, were not parties to any mutuality of concession by which they might be bound to limit their judicial authority in favor of an extraordinary blanket immunity for state officials.

b. This Court's federalism jurisprudence is inconsistent with a rule of extraordinary state official immunity exclusive to tribal courts.

Adherence to the logic of a consensual constitutional order resulted in the Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979) (Blackman, J., dissenting; Rehnquist, J., dissenting), in which it was held that the mutuality of concession in the constitutional compact did not include an agreement among the states to accord sovereign immunity to one another. In determining that Nevada's claimed

sovereign immunity and derivative state law immunities for Nevada officials were not binding on the courts of California or other states, the Court concluded that the Constitution did not alter the freedom of each state to determine whether or not to extend immunities to other states as a matter of comity. *Id.* at 425.

The implication of *Hall* for tribal courts is clear. If the Constitution did not establish for states an obligation to yield to the sovereign immunity claims of other states, it could not have imposed on tribes a similar obligation, much less an obligation to effectively accord state officials an extraordinary blanket immunity. As in *Blatchford,* the tribes are like foreign states in respect to the sovereign immunity of states. Not only did they fail to agree to inter-sovereign immunities for the benefit of states of the Union as part of the constitutional plan, they were not even part of the plan. States, and in certain circumstances state officials, may be extended immunities in tribal courts as a matter of comity. But rather than being a function of limitations in the Constitution's text or structure, the extent of state or official immunity in tribal court (assuming jurisdiction otherwise) remains a matter of the relevant tribal law, and where applicable, federal law.[13]

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[13] This outcome is not changed by the fact that reservation lands, or other Indian country over which tribal court jurisdiction extends, are invariably geographically located within states. Despite such geography, states have no power to dictate rules that are binding on the exercise of tribal authority within Indian country, other than pursuant to congressional authorization. *See McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this nation's history."); *Arizona v. Turtle*, 413 F.2d 683 (9th Cir. 1969) (state officers do not have jurisdiction to conduct activities on Indian land and must adhere to tribe's legal procedures). Congress has not authorized Nevada to dictate rules of immunity to the Fallon tribal court. *See, infra*, notes 16-19 and accompanying text. Additionally, Nevada by statute recognizes it has no

This conclusion follows from the pre-constitutional principle that the immunity of a sovereign in the courts of another sovereign is determined by the law of the forum sovereign, absent an express or implied agreement to the contrary. *See Hall*, 440 U.S. at 416.[14] In *Hall*, the Court relied on Chief Justice Marshall's reiteration of this principle in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812),[15] thus shedding light on the original understanding of the nature of sovereign immunity as it existed at the time of the convention and what the constitutional plan was not meant to accomplish in relation to it.

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jurisdiction over civil actions arising in Indian country unless the tribe consents to such jurisdiction. *See* Nev. Rev. Stat. § 41.430(4) (jurisdiction over proceedings in which Indians are parties); *see generally Snooks v. Ninth Judicial Dist. Court*, 919 P.2d 1064 (Nev. 1996). In this particular case, the state court judge, in responding to the first request for a search warrant, specifically acknowledged that he had no jurisdiction over the Fallon Reservation. Pet. App. G1.

[14] The Court in *Hall* surveyed the doctrine of sovereign immunity as it existed at the founding of the Union and discerned that it was "an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts [in which immunity could be binding] and the other to suits in the courts of another sovereign [in which immunity may be extended but only as a matter of comity] . . . . his explanation adequately supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts." 440 U.S. at 416.

[15] In *The Schooner Exchange*, Chief Justice Marshall considered the question of jurisdiction of an American court over a vessel in which Napoleon, the reigning Emperor of France, claimed a sovereign right. Marshall reasoned that "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute . . . . All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself." 11 U.S. (7 Cranch) 116, 136 (1812). After noting that the source of any immunity for the French vessel must be found in American law, the Chief Justice interpreted American law as recognizing such an immunity in accordance with the common usage among nations at the time. *Id.* at 136-40.

Admittedly, the analysis here suggests an asymmetry in state-tribal relations that is perhaps uncomfortable. While an absence of relevant federal and constitutional prescriptions leaves tribes free to decide for themselves issues of state immunity from suit, constrained only by principles of comity, federal law clearly mandates that state courts accord immunity from suit to tribes. *See Kiowa Tribe of Okla. v. Manufacturing Techs., Inc*, 523 U.S. 751 (1998). However, Mr. Hicks is not attempting to benefit from or maintain such an asymmetry. Rather, he is trying to avoid the converse asymmetry that the petitioners advocate: a condition in which state officials may not be sued in tribal court in their individual capacities, while individually named tribal officials may be sued in state court. *See* cases cited, *supra*, note 9.

The condition that exists to free tribal courts from state sovereign immunity is a product of a constitutional order that excludes tribes and renders them subject to the political domain in which Congress is prevalent. *Cf. Kiowa Tribe*, 523 U.S. 751 (tribal sovereign immunity, subject to congressional plenary authority). Any altering of this condition is best handled by Congress. Congress has not been idle relative to the examination of sovereign immunity. In the last session of Congress, no less than fifty bills were considered that contained concepts of sovereign immunity at either the international, federal, state, or tribal level,[16] and no less than fifty-five such bills were considered during the

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[16] Bills during the 106th Congress (1999): H.R. 2, H.R. 22, H.R. 271, H.R. 410, H.R. 448, H.R. 617, H.R. 775, H.R. 795, H.R. 1141, H.R. 1470, H.R. 1475, H.R. 1565, H.R. 1944, H.R. 2242, H.R. 2352, H.R. 2366, H.R. 2366, H.R. 2456, H.R. 2512, H.R. 2926, H.R. 2956, H.R. 3291, H.R. 4288, H.R. 5241, H.R. 5327, H.R. 5330, H.R. 5344, H.R. 5529, H.R. 5606, S. 421, S. 438, S. 613, S. 615, S. 669, S. 685, S. 837, S. 1028, S. 1138, S. 1185, S. 1259, S. 1368, S. 1835, S. 2081, S. 2580, S. 2590, S. 2597, S. 2778, S. 3008, S. 3231.

105th Congress.[17] It is clear from the versions of the legislation involving Indian tribes that Congress is carefully examining the issues of sovereign immunity in various contexts.[18] In particular, "over the last several years, the Congress has held extensive hearings" and spent countless hours examining sovereign immunity in the tribal-state context[19] and has chosen not to make a law granting state officials the kind of blanket immunity from the exercise of tribal authority that the petitioners advocate here.

The Court need not decide in this case whether states themselves are immune from suit in tribal court. But if the Court were to declare an extension of state sovereign immunity to tribal courts, such an extension should be consistent with the federal common law which allows individual capacity suits. *Cf. Montana v. Gilham*, 932 F. Supp. 1215, 1223 (D. Nev. 1996), *aff'd*, 133 F.3d 1133 (9th Cir. 1998) (holding tribes bound to accord states sovereign immunity, since states must accord tribes sovereign immunity).

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[17] Bills during the 105th Congress (1998): H.R. 5, H.R. 52, H.R. 128, H.R. 253, H.R. 695, H.R. 992, H.R. 1195, H.R. 1340, H.R. 1376, H.R. 1503, H.R. 1531, H.R. 1534, H.R. 1805, H.R. 1861, H.R. 2015, H.R. 2021, H.R. 2141, H.R. 2607, H. R.2709, H.R. 3000, H.R. 3026, H.R. 3262, H.R. 3535, H.R. 3579, H.R. 3595, H.R. 3658, H.R. 3848, H.R. 4250, S. 5, S. 8, S. 78, S. 79, S. 514, S. 515, S. 610, S. 625, S. 648, S. 717, S. 781, S. 886, S. 977, S. 1224, S. 1256, S. 1302, S. 1357, S. 1572, S. 1691, S. 1771, S. 1899, S. 1923, S. 2097, S. 2236, S. 2271, S. 2454, S. 2608.

[18] *See, e.g.*, the introduced version of S. 2580 contained language intended to disclaim any waiver of sovereign immunity, but the reported version struck that language; the enrolled version of H.R. 3291 contains a disclaimer of any waiver of sovereign immunity, but the introduced version did not contain such a provision. Both H.R. 795 and S. 438 contain limited waivers of the sovereign immunity of the United States in all versions.

[19] S. Rep. No. 106-150, at 11 (1st Sess. 1999).

The controlling principle of *Hall*, and the narrower proposition advanced here to maintain individual capacity suits, are not changed or undermined by this Court's subsequent state sovereign immunity jurisprudence. Rather the principle has been confirmed. In *Alden* the Court was careful to distinguish the situation before it, in which the state was asserting immunity from a federal cause of action in its own court, from that of *Hall*, in which Nevada was asserting immunity in a sister state court. *Alden*, 527 U.S. at 738-39. Likewise, instead of suggesting limitations on state or tribal courts, the Court in *Blatchford*, *Coeur d'Alene*, *Pennhurst*, and *Seminole Tribe* concerned itself with the limitations on *federal* judicial and legislative power resulting from the delegated nature of federal authority and the unique constitutional compact among the states, a compact to which the tribes with their inherent authority are not parties.[20] In each of these cases, the Court addressed attempts at invoking federal court jurisdiction or federal law to sue states or their agencies; it did not suggest jurisdictional constraints on individual capacity suits of the kind involved here.[21]

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[20] *See Alden v. Maine*, 527 U.S. 706 (1999) (suit brought in state court under federal Fair Labor Standards Act); *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) (suit brought in federal district court on federal equal protection and state law grounds); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) (suit brought in federal district court on quiet title action); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (suit brought in federal district court for violation of federal constitutional and statutory rights and state law); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (suit brought in federal district court under Indian Gaming Regulatory Act).

[21] *See Alden*, 527 U.S. at 711 (suit brought against State of Maine); *Blatchford*, 501 U.S. at 778 (suit brought against Commissioner, Department of Community and Regional Affairs of Alaska, in official capacity); *Coeur d'Alene*, 521 U.S. 261 (suit brought against State of Idaho, state agencies and state officials (quiet title action against officials found to be against the state due to effect on state ownership and control of land)); *Pennhurst*, 465 U.S. 89 (suit brought against Pennsylvania

Nowhere in these decisions is it suggested that the Eleventh Amendment, or related norms implicit in the constitutional plan or structure, are limitations upon the authority of tribal courts, much less that state sovereign immunity constitutionally extends to bar tribal court jurisdiction over individually sued state officials.

In their *Amicus Curiae* brief, eighteen states (the "*amici* states") take note of the limitations on federal authority "of not only the Tenth and Eleventh Amendments but also the States' sovereign immunity 'inher[ing] in the system of federalism established by the Constitution.'" States Amicus Brief at 17 (quoting *Alden*, 527 U.S. at 730). However, in stark contrast to the petitioners' theory, the states concur with the respondent Hicks that:

> [n]o like limitations exist with respect to the exercise of inherent authority by Indian tribes. As this Court has long held, tribes are extra-constitutional quasi-sovereigns not constrained by the Bill of Rights . . . or, presumably, any other provision of the Constitution.

States Amicus Brief at 25 (citing *Talton v. Mayes*, 163 U.S. 376, 384 (1896)); *Blatchford*, 501 U.S. at 782. The petitioners' constitutional theory for a blanket immunity against tribal jurisdiction, accordingly, should be rejected.

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institution, Pennsylvania Department of Public Welfare and various state officials (state law claim against officials found to be against state because it would force state to amend laws)); *Seminole*, 517 U.S. 44 (suit brought against State of Florida and its Governor).

C. The Argument that this Case Should Establish an Additional Divestiture of Tribal Jurisdiction Rests on an Historically and Doctrinally Inaccurate View of the Effects of the European Discovery of Indian Lands, a View which Cannot be Sustained Under Modern Principles of Racial Equality.

Ultimately, the petitioners argue for a finding of no tribal court jurisdiction in this case, not on the basis of any consensual arrangement of the kind that defines federal-state relations, nor on the basis of controlling precedent, but rather on the basis of an alleged implied "additional divestiture of tribal power" that has not yet been identified by this or any other court. Pets. Brief at 18. According to the petitioners, such an implied divestiture, which this case newly "exposes," results in tribal courts lacking any jurisdiction over non-Indian state officials even when they enter onto tribal land and otherwise subject themselves to the authority of the tribe. The petitioners cannot identify precisely when or how Indian tribes were divested of their inherent tribal authority over tribal land under United States law. They identify this implied limitation as having been imposed "surely . . . when the nation was formed." *Id.*

Having avoided the petitioners' erroneous constitutional argument, the *amici* states embrace a variant of the implicit divestiture theory. With equal vigor, but also without basis in historical fact or controlling precedent, the *amici* states urge this Court to use this case to "restrict or eliminate inherent tribal authority" over state officials and their conduct on tribal land. States Amicus Brief at 22. Echoing the petitioners' conviction, they assert that states acquired immunity against the tribes and rendered them inferior sovereigns "necessarily . . . at the time of the Nation's founding." *Id.* at 7.

While the petitioners remain vague about the source of the additional implicit divestiture of tribal jurisdiction that it

would have this Court declare, the *amici* states reveal explicitly what is at the foundation of the effort to find a new divestiture of tribal power: an historically inaccurate and outmoded rendition of the European "doctrine of discovery." States Amicus Brief at 23.

Their misguided, joint effort to have this Court manufacture and declare a wholly new divestiture of tribal powers, in the absence of any federal treaty or congressional act, rests on a view of the doctrine of discovery that is at odds with the one incorporated into federal common law by this Court over a century and a half ago. The petitioners and *amici* states adopt what can be called the enlarged version of the doctrine, which was attractive to European colonial powers during the colonial era. Under this version of the doctrine, the mere act of "discovering" Indian tribes and their lands is deemed to vest the discoverer with complete sovereignty over the tribes and render the tribes' own sovereignty diminished and subjugated.

In its enlarged version, the discovery doctrine sets aside bedrock principles of popular sovereignty and allows for a political order to be constructed upon rank inequality and the exercise of power. Moreover, with its roots in the same colonial era attitudes that justified slavery, the enlarged version of the doctrine of discovery remains "frozen in an age of racial discrimination," *Mabo v. Queensland* (1992) 107 A.L.R. 1, ¶ 41 (Austl.) ("*Mabo II*"). The argument advanced now to urge a finding of additional divestiture of tribal authority, insofar as it rests on the doctrine of discovery, cannot be sustained under modern principles of racial equality. It should not be entertained by this Court.

1. Because of the Problematic Aspects of the Doctrine of Discovery, this Court was Careful to Limit its Reach Such that the Doctrine Should Have No Application Here.

The legal fiction that the discovery of the New World by Europeans resulted in inherent limitations on tribal rights and sovereignty in favor of the European discovering nation traces its origins back to an archaic set of legal rules and principles originating in the Middle Ages and the Crusades to the Holy Lands.[22] As the Australian High Court ruled in recognizing the aboriginal title rights of that country's indigenous peoples in its landmark decision, *Mabo II*, an "enlarged" interpretation of the discovery doctrine as vesting absolute rights of sovereignty and title in a European discoverer of lands occupied by non-Christian "backward peoples" depended on "a discriminatory denigration of indigenous inhabitants, their social organization and

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[22] Under the Roman Catholic Church canon law's legal theory of universal papal jurisdiction "over all men and power over them in law but not in fact," Pope Innocent IV, *Commentaria Doctissima in Quinque Libros Decretalium* (c. 1250 A.D.), *reprinted in* David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr., *Federal Indian Law: Cases and Materials* 43 (4th ed. 1998), Christian princes were authorized throughout the medieval era by the Pope to undertake holy wars of conquest against the "heathen" and "infidel" peoples of the Levant who opposed the Church's assertion of superior rights over the Holy Lands. *See* Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* 34-50 (1990). It was under this same legal theory holding that non-Christian "savage" peoples were under the superior and absolute *de jure*, if not the *de facto*, sovereignty and jurisdiction of the Pope, that Pope Alexander VI made his famous donation of the New World to Spain by the papal bull *Inter caetera divinai* (1493). The Pope's bull granting Spain the entire New World invested the Spanish Crown with "full, free and integral power, authority and jurisdiction," and forbade any other person to interfere with the Crown's rights in the New World for purposes of trade or for any other reason, upon pain of excommunication.

customs." *See id.* at ¶ 33, ¶ 39. It regarded the lands occupied by indigenous tribal peoples as *terra nullius*; vacant lands, because the peoples were "so low in the scale of social organization" that Europeans need not recognize their legal systems or governing authority over the lands they occupied. *Id.* at ¶ 41. Significantly, based on Australia's Racial Discrimination Act of 1975, international human rights standards, and modern principles of racial equality, the Australian High Court refused to accept such a doctrine as the "contemporary law" of a civilized democratic state, and ruled that it would not allow its domestic law to be "frozen in an age of racial discrimination" by continuing to accept the enlarged view of *terra nullius* advocated by the State of Queensland in *Mabo II*. *Id.*

The petitioners and the *amici* states would have this Court ignore the colonial era history and origins of the doctrine of discovery and related conceptions of inherently diminished tribal power. This Court, however, long ago took judicial notice of the discovery doctrine's racially discriminatory origins, and limited its effects on Indian rights and sovereignty under United States law. In *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), Chief Justice Marshall, writing for the Court, noted that it was only "*the character and religion of its inhabitants*" that afforded Europeans "an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy." *Id.* at 573 (emphasis added). In *Johnson* and subsequent cases, Chief Justice Marshall was unwilling to enforce an enlarged version of the doctrine of discovery which purported to establish, by silent divesting operation of law, an absolute sovereignty and title over lands discovered by a European nation, simply because those lands were occupied by an Indian tribe.

Johnson is among the most important early decisions by the Supreme Court defining Indian rights and status under the doctrine of discovery. Two other decisions, also written

by Chief Justice Marshall, are *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). In those seminal cases, the Chief Justice precisely delineated the minimal limitations on Indian rights and sovereignty "necessarily" required to effectuate the purposes of the discovery doctrine; *i.e.*, acquiring exclusive rights of territorial acquisition and colonial control over lands occupied by Indian tribes. The notion that the doctrine, as brought by European nations to North America, included an immunity on the part of the European discoverer from the exercise of tribal authority, was never discussed, or even acknowledged, in any of those cases. As Chief Justice Marshall recognized for the Court in *Worcester*, "the actual state of things" in colonial North America simply did not allow for the assertion of such an additional divestiture of tribal rights and sovereignty under the limited operation of the discovery doctrine. *Worcester*, 31 U.S. (6 Pet.) at 543.

Johnson offers the most extended discussion of the doctrine and its consequences for Indian sovereignty and rights under United States law. To avoid "conflicting settlements, and consequent war with each other," Chief Justice Marshall explained, the nations of Europe adopted a principle to regulate their "right of acquisition" in Indian-held lands. *Johnson*, 21 U.S. (8 Wheat.) at 573. "This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which might be consummated by possession." *Id.* He went on in *Johnson* to define two limitations on the "original inhabitants" of the lands claimed by the European nation. *Id.* at 574. First, the discovering European nation possessed "the sole right of acquiring the soil from the natives, and establishing settlements upon it." *Id.* at 573. Second, "[t]hose relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired

being exclusive, no other power could interpose between them." *Id.*

In the *Cherokee Cases*, the Court consistently reaffirmed these two extremely limited effects of the doctrine of discovery on Indian rights and sovereignty identified in *Johnson*. In *Worcester*, Chief Justice Marshall was writing for the Court in the midst of the constitutional crisis that gripped the nation,[23] and in the face of the State of Georgia's sweeping declarations (reminiscent of the *amici* states' position) of the discovery doctrine's effects on Indian sovereignty.[24] He nonetheless declared for the Court an even more restricted holding on the very narrow limitation upon Indian rights and sovereignty that necessarily flowed from adoption of the doctrine of discovery by the United States:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, *with the single exception* of that imposed by irresistible power, which excluded them from intercourse with any other European potentate that the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians.

Worcester, 31 U.S. (6 Pet.) at 559 (emphasis added).

As this Court implicitly recognized in *Worcester*, conditions on the ground in North America during the early

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[23] As former President John Quincy Adams declared, "the Union is in the most imminent danger of dissolution . . . The ship is about to founder." Albert J. Beveridge, 4 *The Life of John Marshall* 544 (1919).

[24] *See generally* Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 Stan. L. Rev. 500 (1969) (describing how the "Governor, legislators, and judges of Georgia had publicly dared the Supreme Court to interfere" with the state's asserted sovereign rights over the Cherokee Nation and its reservation).

colonial period simply did not permit or allow Great Britain to unilaterally assert and enforce as law any blanket immunities from tribal authority and control over tribally-held lands, regardless of the doctrine of discovery:

> It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.

Id. at 543.

In his powerfully evocative words—which hold particular relevance to the arguments of the petitioners and the *amici* states—the Chief Justice went on to conclude: "We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed light on existing pretensions." *Id.*

The actual state of things in the United States today—where Indian tribes are recognized and respected as a third sovereign by Congress, the Executive and this Court, and by the states themselves, see Part I.D, *infra*, exposes the absurdity of the assertions made by the petitioners and the *amici* states in support of establishing that tribes have been divested of authority over state officials who come onto tribal land and perform functions in relation to tribal members.[25]

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[25] *See generally* Milner S. Ball, *Constitution, Courts, Indian Tribes*, 1987 Am. B. Found. Res. J. 1, 25-26 (observing that the doctrine of discovery as articulated by Marshall "has small consequences for tribes").

2. *The Court's Decision in Oliphant Does Not Provide a Basis for This Court to Establish an Additional Inherent Limitation on Tribal Authority on Indian-Owned Land.*

For nearly one hundred fifty years, this Court refused to extend the two limitations on tribal power under the European doctrine of discovery delineated by Chief Justice Marshall.[26] In 1978, in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court announced a departure from Marshall's framework to allow the possibility of finding additional limitations on tribal power by virtue of discovery and incorporation into the territory of the United States. In *Oliphant* the Court held that, as a result of the conditions of their incorporation, "Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress." *Oliphant*, 435 U.S. at 208.[27] The Court established the principle that "Indian tribes are proscribed from exercising those powers of autonomous states that are expressly terminated by Congress *and* those powers *inconsistent with their status*." *Id.* (emphasis supplied in original).

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[26] The Chief Justice provided sound reasons for future courts to avoid any temptation to expand the artificial limitations imposed on Indian tribes by the European doctrine of discovery. In *Johnson*, he stated that the Court did not mean by its opinion "to engage in the defense of those principles which Europeans have applied to Indian title." *Johnson*, 21 U.S. (8 Wheat.) at 589. He stated a near identical view in *Worcester* on the legal validity of the theoretical rights asserted under the European discovery doctrine; "The extravagant and absurd idea, that the . . . settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man." *Worcester*, 31 U.S. (6 Pet.) at 544-545. Under the doctrine, he explained, "according to the common law of European sovereigns respecting America," the European discoverers "might rightfully convey . . . the exclusive right of purchasing such lands as the natives were willing to

The principle that tribes are implicitly divested of powers inconsistent with their status, however, should be interpreted as only a minor variation from the Marshall framework, a variation that does not provide for the additional finding of divested tribal powers that the petitioners advocate here. The more expansive interpretation of the principle of *Oliphant* advocated by the petitioners and the *amici* states must rely on the enlarged version of the doctrine of discovery that the Court eschewed early on. The Court in *Oliphant* expressly based its new implicit divestiture rule announced in that case upon the language and holding of *Johnson v. M'Intosh*: "Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. 'Their rights to complete sovereignty, as independent nations [are][28]

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sell. The crown could not understand to grant what the crown did not affect to claim; nor was it so understood." *Id.* at 545.

[27] Whereas *Oliphant* has met with much scholarly criticism, Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 Am. Ind. L. Rev. 353 (1994); Peter C. Maxfield, *Oliphant v. Suquamish Tribe: The Whole is Greater Than the Sum of the Parts*, 19 J. Contemp. L. 391 (1993); Milner S. Ball, *Constitution, Courts, Indian Tribes*, 1987 Am. B. Found. Res. J. 1, Mr. Hicks is not contesting the validity of *Oliphant*'s limited holding that Indian tribes do not possess criminal jurisdiction over non-Indians on the reservation under United States law. He only asks this Court not to extend the principle of *Oliphant* to the facts of this case, and establish an additional divestiture of inherent tribal civil jurisdictional authority over non-members or state officials on Indian owned and controlled land.

[28] Chief Justice Marshall's original language in *Johnson*, 21 U.S. (8 Wheat.) at 574 stated that the tribes' "rights to complete sovereignty, as independent nations, *were* necessarily diminished." (Emphasis added). The majority opinion's quotation of this sentence in *Oliphant* changes the verb "were" to "are," see *Oliphant*, 435 U.S. at 209, without any explanation for the change. The *Oliphant* Court's change, however,

necessarily diminished.' *Johnson v. M'Intosh*, (8 Wheat.) 543, 574 (1823)." *Oliphant*, 435 U.S. at 209.

The *Oliphant* majority opinion explained its specific holding of a limitation on tribal criminal jurisdiction by recognizing that the protection of territory within the external political boundaries of the United States (the precise protection afforded to the United States under the European doctrine of discovery as so held in *Johnson*, see Part I.C.1, *supra*), "is, of course, as central to the sovereign interests of the United States as it is to any other sovereign nation." *Id.* at 210. To this point, following Chief Justice Marshall's identification of the sovereign interests of the United States protected by the European doctrine of discovery, the *Oliphant* Court then went one step further and identified another central sovereign interest of the United States

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should not be misread to significantly alter Chief Justice Marshall's meaning. Chief Justice Marshall was referring in this sentence only to the two specific tribal powers that "were necessarily diminished" as a result of the doctrine of discovery: the power to dispose of their lands to whomsoever the Indians pleased, and the power to enter into foreign alliances with any other European nation. *See Johnson*, 21 U.S. (8 Wheat.) at 574. All subsequent limitations on tribal rights and sovereignty, including the ultimate and exclusive right "to extinguish the Indian title of occupancy," as Chief Justice Marshall expressly stated in *Johnson*, were to be obtained by "purchase or by conquest." *Id.* at 587. The doctrine's effects, in other words, operated only in the past, at discovery, and those effects were quite limited. The doctrine, as Chief Justice Marshall's original language in *Johnson* clearly establishes, does not continue to affect the present rights and sovereignty of Indian tribes protected under United States law, beyond the rights necessarily divested under the doctrine. These "were" the rights to alienate their land without Congress' permission and the right to enter into alliances with foreign nations. All the other inherent tribal rights which survived operation of the doctrine, as *Johnson* makes clear, can only be diminished or extinguished subsequent to discovery by purchase or conquest, *i.e.*, by the exercise of Congressional plenary power.

protected by the doctrine's principle of diminished Indian sovereignty:

> But from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty.

Oliphant, 435 U.S. at 209.

It was this overriding sovereign interest in protecting its citizens "from unwarranted intrusions on their personal liberty" that led the *Oliphant* majority to conclude that tribes had been implicitly divested of criminal jurisdiction over non-Indian United States citizens. *Id.* Nothing in the facts of the present case implicates the "personal liberty" interests of United States citizens to be free from the "unwarranted intrusions" of tribal criminal prosecution. The rationale and principle of *Oliphant* for building upon the limitations on tribal power that had been established long before simply do not apply here. No overriding sovereignty interest of the United States can be identified, akin to the possibility of the loss of personal liberty that is implicated in criminal prosecutions, to establish a blanket immunity for state officials from suit in tribal court.

The Court has in fact only applied the implicit divestiture principal of *Oliphant* in one situation outside of the criminal jurisdiction context, where Tribes have "retained no gatekeeping right" over lands on the reservation, and thereby "cannot assert a landowner's right to occupy and exclude." *Strate v. A-1 Contractors*, 520 U.S. 438, 456 (1997); *see also Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Tribes*, 492 U.S. 408 (1989); *South Dakota v. Bourland*, 508 U.S. 679 (1993). In all of these cases, Congress had divested tribes of any purported right to

exclude non-Indians on the reservation lands at issue either by alienating the land to non-Indian fee-holders under the nineteenth century allotment acts (*Montana*), by taking tribal lands and broadly opening them up for public use (*Bourland*), or by authorizing the grant of a right-of-way easement over Indian lands for a state highway (*Strate*). The reason for applying *Oliphant's* implicit divestiture principle in these cases was stated precisely by the Court in *Bourland*; the implied limitation on tribal regulatory authority derived from the fact that in taking tribal lands for non-Indian uses, Congress had "eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe." *Bourland*, 508 U.S. at 689.

The petitioners and the *amici* states point to no congressional act, treaty or mechanism divesting tribes of their "gatekeeping right" over the land at issue in this case. The Fallon tribal court in fact was exercising the very "gatekeeping right" which the tribe possesses as part of its inherent civil jurisdictional authority over tribal land recognized by United States law. Petitioners ask this Court to establish a new rule that extends far beyond the principle of *Oliphant*.

Ultimately, the argument for this Court to establish an additional divestiture of tribal authority over Indian-owned and controlled land on the reservation without Indian consent must derive its grounding, rationale and principle from the silent operation of a medievally-derived legal theory which this Court has applied previously only in a very limited fashion. Such a holding in this case would be inconsistent with modern notions of racial equality, this Court's prior decisions, and the protection of Indian rights and sovereignty guaranteed and promised under United States law through treaties and statutes, and should be rejected by this Court.

D. Needed Cooperation Between States and Tribes, Including in Matters of Law Enforcement, Would be Undermined by a Rule Preventing the Exercise of Tribal Court Jurisdiction Over State Officials.

Historically, for Indian tribes, "the people of States where they are found are often their deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886). Only in recent times have tribes and states been able to find sufficient common ground in order to work cooperatively in governance matters of mutual concern. This cooperation is needed because of the existence of both tribes and states as sovereigns and the complex nature of human interaction that implicates their respective spheres of authority. Tribal-state cooperation has often been mandated by congressional action, but, increasingly, tribes and states have been able to find sufficient common ground and respect for each other's sovereignty to work cooperatively without a federal mandate. If, as the petitioners urge, state officials are granted blanket immunity from tribal jurisdiction, even for acts on reservation lands involving tribal members, the future of state-tribal cooperation, especially in law enforcement, could be seriously imperiled.

States and tribes have negotiated numerous cooperative agreements in critical areas of law enforcement, including but not limited to agreements for cross-deputization and extradition, inter-jurisdictional enforcement of warrants, subpoenas and other forms of legal process, provision of parole and probationary supervisory services, juvenile justice issues, enforcement of child support and custody orders, domestic relations law matters, domestic violence restraint orders, cross recognition of civil judgments, full faith and credit, mutual enforcement of traffic laws, and the sharing of records, information, reports and resources. David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr., *Federal Indian Law: Cases and Materials* (4th ed. 1998).

Other cooperative agreements include a wide range of governance issues.[29]

A number of state governors and legislatures themselves have committed to cooperation with tribes.[30] The Conference of State Chief Justices has recognized the importance of tribal-state jurisdictional arrangements and has set to work implementing strategies to promote communication, cooperation and comity between state and tribal courts.[31] States have found cooperative agreements

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[29] Such other agreements have covered issues of contract, tort and property laws, land rights, development and zoning, repossessions, taxation, economic development and infrastructure development, environmental issues, hunting and fishing regulations, and water rights. *Id.* In Oklahoma, for example, as of October 1999, the state and tribes had jointly created thirty-one tobacco regulation compacts, eleven compacts regarding gaming, twenty-four contracts regarding motor fuel, and one agreement regarding the Temporary Assistance to Needy Families (TANF) program. *See* Oklahoma Indian Affairs Commission, http://www.state.ok.us/~oiac/cca.html. *See also* Frank R. Pommersheim, *Tribal-State Relations: Hope For The Future?* 36 S.D. L. Rev. 239 (1991) (describing over eighty such tribal-state cooperative agreements in existence in more than a dozen states).

[30] For example, the Western Governors' Association has determined that, especially in rural areas, many problems faced by the states and tribes are the same and has begun projects between state governors, tribal chairmen, and interested groups to promote these mutual concerns. 1990 *Annual Report To The Western Governors' Association, A New Era For State-Tribal Relations* 14-18 (July 1990). *See also* So. Dak. C.L. § 1-24-1(1) (incorporating cooperation with tribes in the joint exercise of governmental powers statute); Ariz. Rev. Stat. § 9-461 (granting counties ability to enter into intergovernmental agreements with any tribes); 1984 Idaho Sess. Laws Ch. 72 and 119 (aa) (authorizing local governments and state and public agencies to enter into agreements with tribes for the concurrent exercise of powers and transfer of real and tangible property).

[31] Stanley G. Feldman & David L. Withey, *Resolving State-Tribal Jurisdictional Dilemmas*, 79 Judicature 154 (1995) (a specific recommendation is to "make intergovernmental agreements that provide for cross-utilization of facilities, programs, and personnel by state and tribal court systems"). *See also* Dennis Gibb, *Intergovernmental*

with tribes helpful in clarifying and simplifying the application of social policies and in aiding in the resolution of domestic disputes and issues surrounding religious practice. In some states this cooperation even extends to issues of mental health.[32] Nevada itself and its agencies have entered into a number of tribal-state cooperative agreements, passed relevant legislative enactments, and have experienced amicable relationships with tribes.[33]

Nevada's own cooperative agreements with tribes, as well as the hundreds of other such tribal-state agreements throughout the United States, reflect the reality that, contrary to the assertion of the petitioners, the current system of federalism does include tribes as a third entity. By virtue of acts of Congress and rulings from this Court, tribes are now ensconced within the federalism framework. In the words of Justice O'Connor:

> Today, in the United States, we have three types of sovereign entities—The Federal government, the states,

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Compacts in Native American Law: Models for Expanded Usage, 112 Harv. L. Rev. 922 (1999).

[32] In Arizona, an involuntary commitment order from a tribal court is recognized as enforceable by any court of record in the state. *See* Ariz. Rev. Stat. § 12-136.

[33] *See, e.g.*, 1994 NEV. OP. ATTY. GEN. NO. 19, Indians; Jurisdiction: Criminal Law; Arrest: Tribal Authorities are authorized by state statute Nev. Rev. Stat. § 171.1255 to arrest non-Indians who violate state law in Indian country; 1991 NEV. OP. ATTY. GEN. NO. 3, Indians; Gaming; Liquor: Suggestion that the county enter into a cooperative agreement with the Fort Mojave Tribe to identify rights and obligations between the State and Tribal Law enforcement; 1980 NEV. OP. ATTY. GEN. NO. 42, Nevada Highway Patrol Jurisdiction on Indian Reservations; Nev. Rev. Stat. § 41.430 (no state civil jurisdiction unless tribes have consented); Nev. Rev. Stat. § 233A.010 (establishes Indian Commission); Nev. Rev. Stat. § 233A.130 (jurisdiction of administrative agencies not extended over Indian country without consent); 1985 Nev. Stat. Ch. 115 § 3 (tribal police authorized to make arrests outside reservation boundaries when the tribal officer is in fresh pursuit).

> and the Indian tribes. Each of these sovereigns has its own judicial system, and each plays an important role in the administration of justice in this country.

O'Connor, J. *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1 (1997). Justice O'Connor's comments are timely within the contemporary reality of American society in which tribes play an important role.

If the petitioners are successful in achieving a blanket immunity for state officials from tribal jurisdiction, the developing framework of tribal-state cooperation could easily be crippled. The fair administration of justice and effective law enforcement for both Indians and non-Indians alike would be undermined by an asymmetrical jurisdictional rule providing state officials an absolute immunity from suit in tribal court, while leaving tribal officials exposed to suit in state courts. States and their officials may no longer see the need to negotiate cooperative agreements with the tribes if they are immunized for all actions in Indian country. Tribes also would be less likely to enter into negotiations or uphold current obligations if the reality were that the state party or its agents could in fact be completely immune from any review and monitoring power by tribes and their courts. The potential destabilization of cooperative agreement-making, in addition to significantly decreasing the likelihood of reaching mutually satisfactory solutions to both state and tribal communities, would also weaken tribal governments and self-determination in direct contrast to this Court's stated recognition and encouragement for tribal sovereigns.

II. INDIVIDUAL IMMUNITY CLAIMS RAISED BY THE STATE OFFICIALS SHOULD FIRST BE ADJUDICATED IN TRIBAL COURT.

While the petitioners' assertion of sovereign immunity does not pose a bar to the jurisdiction of the tribal court as a matter of federal law, the individual petitioners may raise personal immunity defenses to Mr. Hicks' causes of action.

These immunity defenses should be adjudicated in the Fallon Tribal court prior to any federal court intervention. The district court and court of appeals were correct to refrain from ruling on the petitioners' individual immunity defenses and to require instead that the claims be adjudicated first by the tribal court. Having only confronted the petitioners' individual immunity defenses in the context of their motion to quash service of process, the tribal court has not yet had the occasion to evaluate the facts that are relevant to an entitlement of immunity, nor to examine the precise contours of the relevant tribal or federal law. Likewise, Mr. Hicks has not had the opportunity to fully discover and confront the facts that might be alleged to support immunity in the face of his own allegations of malicious intent, bad faith, and conduct beyond the scope of lawful authority.

Only if this Court were to agree with the petitioners' far-reaching assertion that, as matter of federal law, state officials are entitled to an extraordinary absolute immunity merely upon a showing of official status, might federal intervention be permissible without allowing Mr. Hicks the opportunity to confront the petitioners' immunity defenses in tribal court. As discussed above, such blanket immunity for state officials is not justified for the purposes of jurisdiction and would be unprecedented for a personal immunity defense.

In the absence of such blanket federal law immunity, the petitioners' efforts to bypass the tribal forum and have their immunity defenses determined in the first instance by a federal court should not be allowed to succeed. The determination of the petitioners' immunity defenses, particularly in regard to the tribal law claims, "will require a careful study of the application of tribal law, and tribal court decisions," *Stock West Corp. v Taylor,* 964 F.2d 912, 920 (9th Cir. 1992) (holding district court abused discretion by failing to stay its hand on immunity issue prior to tribal court resolution of question). As a general matter, great deference

should be accorded tribal courts in the application of tribal law. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987).

The presence of federal law issues in this case, or the potential availability of immunity defenses under federal law in connection with Mr. Hicks' § 1983 claims, does not justify any federal court intervention prior to adjudication of the immunity defenses by the tribal court. *See El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 485 n.7 (1999) ("the existence of federal preemption defenses in the more usual sense would [not] affect the logic of tribal exhaustion" because, "[u]nder normal circumstances, tribal courts, like state courts, can and do decide questions of federal law"); *Landmark Golf, Ltd. v. Las Vegas Paiute Tribe*, 49 F. Supp. 2d 1169, 1174-75 (D. Nev. 1999) (tribal court exhaustion required for federal law claim) (citing *United States v. Plainbull*, 957 F.2d 724, 726-28 (9th Cir. 1992)). In cases such as this, where the dispute involves a reservation matter, comity concerns "almost always dictate that the parties exhaust tribal remedies before resorting to a federal forum." *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1378 (10th Cir. 1993).

This Court has held that, with few exceptions, tribal court remedies must be exhausted before the federal courts rule on the jurisdiction of tribal courts. *See National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856-57 (1985); *Iowa Mutual*, 480 U.S. at 15-16. The doctrine of exhaustion of tribal court remedies is based on sound federal policy of deference to tribal courts. *Iowa Mutual*, 480 U.S. at 16. This Court's recognition of the pivotal role that tribal courts play in furthering tribal self-government has included its observations that the doctrine of tribal court exhaustion is further strengthened by the need for tribal courts to "provide other courts with the benefit of their expertise in the event of further judicial review," *National Farmers*, 471 U.S. at 857, and the concern that "unconditional access to a federal forum would place it in direct competition with the tribal courts,

thereby impairing the latter's authority over reservation affairs." *Iowa Mutual*, 480 U.S. at 16 (citations omitted).

The same prudential considerations that require exhaustion of tribal remedies in the context of determining jurisdiction extend to tribal court deliberations more generally. *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21 (1st Cir. 2000) (requiring tribal court exhaustion of contract claims between Rhode Island corporation and tribal agency); *Kerr-McGee v. Farley*, 115 F.3d 1498 (10th Cir. 1997) (deferring tribal court jurisdiction as to claims under Price Anderson Act and noting that exhaustion must include tribal appellate remedies); *United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992) (requiring tribal court exhaustion in suit by United States for trespass penalties under 25 U.S.C. § 179); *Smith v. Moffett*, 947 F.2d 442 (10th Cir. 1992) (requiring tribal court exhaustion as to a federal civil rights claim based upon allegedly unconstitutional conduct by the defendants in securing the plaintiff's arrest, indictment, prosecution, federal court conviction); *A&A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411 (9th Cir. 1986) (requiring tribal court exhaustion as to claim maintained under 42 U.S.C. § 1983 against state and tribal officials). Further, "as a general rule, if a tribe has not explicitly waived exhaustion, courts lack discretion to relieve its litigation adversary of the duty of exhausting tribal remedies before proceeding in a federal forum." *Ninigret Dev. Corp.*, 207 F.3d at 32 (citations omitted). No such waiver has occurred in regard to the present case.

The Fallon tribal court is available to adjudicate Mr. Hicks federal and tribal law claims, as well as the petitioners' immunity defenses to those claims. It should be permitted to do so, so that Mr. Hicks may finally have his day in court.

CONCLUSION

Although historically excluded, hundreds of tribes are part of the fabric of this country. Their courts should be accorded the same dignity that is extended to the courts of the more recent sovereigns of the land. And Mr. Hicks should be allowed to pursue his claims in the Fallon tribal court, without being subject to novel jurisdictional constraints that would apply only to the courts of the country's first peoples. For all the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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